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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

DINA HALLAK,

Plaintiff and Appellant,

v.

KAISER FOUNDATION HOSPITALS,

Defendant and Respondent.

C082875

(Super. Ct. No.
34201500183425)

Appellant Dina Hallak was terminated from her employment as pharmacist-in-charge by respondent Kaiser Foundation Hospitals (Kaiser) after she revealed she had been caught stealing narcotics at her previously undisclosed second job at a Costco pharmacy. Kaiser based the termination on Hallak's agreement with Maximus, the operator of the drug rehabilitation program in which she participated, that precluded her from acting as either a pharmacist-in-charge or pharmacy manager and required close supervision if she worked as a pharmacist. The requirement of close supervision was incompatible with Hallak's position as pharmacist-in-charge.

Hallak contends (1) Labor Code section 1025 (section 1025) compelled Kaiser to allow her to return to her job, (2) the trial court misplaced its reliance on *Gosvener v. Coastal Corp.* (1996) 51 Cal.App.4th 805 (*Gosvener*) (3) she “was able to perform the essential functions of her job,” (4) the trial court “erred by dismissing [her] wrongful termination in violation of FEHA^[1] claim,” (5) the trial court failed to construe the evidence in the light most favorable to her when ruling on the summary judgment motion, and (6) the trial court ignored “direct evidence of discrimination.”

We conclude Kaiser did not violate section 1025 because that statute requires only that an employer allow an employee to participate in a drug rehabilitation program. Section 1025 does not require that Kaiser continue to employ her in a position that is incompatible with the agreement between Hallak and Maximus. The trial court did not err in relying on *Gosvener, supra*, 51 Cal.App.4th 805. For the causes of action alleged by Hallak, it is irrelevant that she might have been able to perform the essential functions of her job. The trial court did not err in dismissing her claim for wrongful termination in violation of FEHA because she did not actually plead a FEHA violation. The trial court also did not err in how it viewed the evidence. Underlying Hallak’s assertion is her unsupported assumption that section 1025 requires an employer to find alternative employment for its employee. Finally, we disagree that the trial court ignored direct evidence of discrimination. Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Operative Complaint

Hallak’s operative complaint sets forth causes of action for (1) violation of section 1025, (2) retaliation for the exercise of her rights under the Family and Medical

¹ Fair Employment and Housing Act (Gov. Code, § 12940 et seq.) (FEHA).

Leave Act of 1993 (FMLA) (29 U.S.C. § 2601 et seq.), and (3) wrongful termination in violation of public policy. In support of these causes of action, the operative complaint alleges:

In June 1990, Hallak began working as a pharmacist for Kaiser. At some point, she began concurrently working for a retail store (later identified as Costco) as an on-call pharmacist. In March 2014, a manager at Costco confronted her about diverting Vicodin – a controlled substance. In May 2014, Hallak informed her Kaiser manager that she was “going on medical leave under the FMLA”. Kaiser approved the leave request. Hallak further alleges that her “leave was design[ated] as FMLA leave by [Kaiser] and was to last until June 13, 2014. [Hallak] was subsequently taken off work by her doctor from June 16, 2014 through August 16, 2014.”

Hallak participated in a drug rehabilitation program from June 13, 2014 until August 5, 2014, and was cleared to return to work on September 15, 2014. On September 23, 2014, Hallak met with her supervisor at Kaiser. At that meeting Hallak disclosed her addiction treatment and gave her supervisor a copy of the contract she had signed with Maximus. Under that contract, Hallak could return to her position “under two conditions: (1) she could not be a pharmacist in charge; and (2) she had to have a work site monitor, who would observe her behavior or performance during work.” Sometime thereafter, Hallak’s supervisor at Kaiser informed her that Kaiser “had employees who were already working with [Maximus] and that she had no problem placing another employee as the pharmacist in charge in order to facilitate [Hallak’s] return to work.”

On October 1, 2014, Kaiser terminated Hallak’s employment.

Motion for Summary Judgment

Kaiser moved for summary judgment/adjudication and alleged the following:

Hallak was an at-will employee at Kaiser. During the time Hallak worked at Kaiser, she also worked as a pharmacist at Costco. Costco terminated Hallak as a pharmacist at Costco after she stole narcotics on three separate occasions. Hallak then went to Maximus, an agency that handles medical professionals with substance abuse problems. Maximus required that Hallak attend a drug rehabilitation program and temporarily cease working as a pharmacist. Hallak took approved FMLA time off from work and enrolled in a drug rehabilitation program with Promises Treatment Center. She was cleared to return to work on September 15, 2014. She was mentally and physically able to return to work on September 15, 2014. Hallak remained off work from Kaiser “because of personal issues with her husband.”

As part of her drug rehabilitation, Hallak agreed with Maximus that she could not act as a pharmacist-in-charge or pharmacy manager. If she worked as a pharmacist, she would have to be supervised by someone on site who was at least one management step above her and would closely monitor her work. On September 26, 2014, Kaiser informed Hallak it would be unable to accommodate her agreement with Maximus. Kaiser did not have anyone in a supervisory position above Hallak because Hallak was pharmacist-in-charge. Also, the agreement with Maximus precluded Hallak from working by herself during night shifts. Since Hallak was no longer able to perform the essential functions of her job, Kaiser terminated her employment. When Kaiser terminated her employment, Hallak had exhausted her FMLA leave and was on discretionary time off from work. At the time of termination, there was no one in a supervisory capacity at least one management level above Hallak.

Opposition to Motion for Summary Judgment

Hallak opposed the motion for summary judgment/adjudication with the following additional allegations: She was able to perform the essential functions of her job as a

pharmacist with the supervision of a worksite monitor. Her termination had nothing to do with her prior work performance at Kaiser. Before terminating her employment, Kaiser did not check whether there were suitable positions at Kaiser pharmacies in other counties.

Summary Judgment

The trial court granted summary judgment in favor of Kaiser. The trial court reasoned that the first cause of action for violation of section 1025 failed as a matter of law because Kaiser accommodated Hallak's enrollment in and completion of a rehabilitation program. Hallak conceded that her second cause of action for violation of the FMLA lacked merit. The third cause of action for wrongful termination cannot be based on a violation of section 1025, and Hallak had not shown that Kaiser acted with discriminatory intent.

From the judgment of dismissal, Hallak timely filed a notice of appeal.

DISCUSSION

I

Section 1025

Hallak contends, "it cannot conceivably be considered meeting the obligation" of section 1025 to require "granting leave without allowing an employee to return" to work. Even if true, the contention does not establish reversible error.

A.

Employer Duties under Section 1025

Section 1025 provides: "Every private employer regularly employing 25 or more employees shall reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program, provided that this reasonable accommodation does not impose an undue hardship on the employer. [¶] Nothing in this

chapter shall be construed to prohibit an employer from refusing to hire, or discharging an employee who, because of the employee's current use of alcohol or drugs, is unable to perform his or her duties, or cannot perform the duties in a manner which would not endanger his or her health or safety or the health or safety of others."

Hallak did not request leave from her job at Kaiser under section 1025. Instead, she kept her enrollment in a drug rehabilitation program secret from Kaiser until *after* she had completed it. To take time off, Hallak relied on the FMLA – a provision of law that she concedes does not give her any valid cause of action against Kaiser. In short, Hallak did not invoke section 1025 to participate in a drug rehabilitation program.

Hallak did not return to work after her participation in the drug rehabilitation program – but not because Kaiser prevented her from returning. Instead, Hallak extended her leave of absence to address her own personal issues. Moreover, Kaiser also did not disallow her from returning to her job due to her participation in a drug rehabilitation program. Instead, Kaiser terminated her because the constraint on her employment that Hallak herself assumed in her agreement with Maximus precluded her from fulfilling her job as pharmacist-in-charge.

Hallak cites no authority for the proposition that section 1025 required Kaiser to move her into another position. Instead, section 1025 expressly allows an employer to discharge an employee who "cannot perform the duties in a manner which would not endanger his or her health or safety." Hallak's agreement with Maximus was based on preventing her from endangering her health and safety by working as pharmacist-in-charge or working as a pharmacist without close supervision. That agreement was inimical to her ability to perform the essential functions of her job and Kaiser was therefore not prevented from terminating her employment by section 1025.

B.

Gosvener and Ability to Perform Essential Functions of her Job

In a related argument, Hallak argues the trial court misplaced its reliance on *Gosvener, supra*, 51 Cal.App.4th 805 and she “was able to perform the essential function of her job.” We are not persuaded.

The trial court determined that “[Hallak’s] claim that she could perform the essential functions of her pharmacist position is not legally relevant to this [cause of action] under § 1025 and cannot create a triable issue of material fact which precludes summary adjudication of this 1st [cause of action]. (See, e.g., [*Gosvener*] [employer permitted to terminate plaintiff after accommodating latter’s need for alcoholism treatment pursuant to § 1025, especially since plaintiff was in a ‘safety-sensitive’ position]”

We agree with the trial court that Hallak’s ability to perform the essential functions of her job is irrelevant to the issue of whether her employer violated section 1025. “The ‘reasonable accommodation’ contemplated by section 1025 is time off from work for the affected employee as necessary to participate in a drug or alcohol treatment program, at least to the extent the employer can provide such leave without undue disruption of its business. (Stats. 1984, ch. 1103, § 1, p. 3729.) Section 1026 further provides that: ‘The employer shall make reasonable efforts to safeguard the privacy of the employee as to the fact that he or she has enrolled in an alcohol or drug rehabilitation program.’ [¶] These Labor Code provisions may reasonably be construed as declarations of legislative policy that an employee’s decision to participate in alcohol or drug rehabilitation implicates serious privacy concerns of both the informational and autonomy varieties.” (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 459-460.)

The trial court correctly determined Hallak's ability to perform the essential functions of her job was irrelevant to the question of whether Kaiser breached its duties under section 1025. Nothing in the trial court's citation of *Gosvener, supra*, 51 Cal.App.4th 805 undermines the correctness of the trial court's reasoning. Accordingly, we reject Hallak's contention.

II

Wrongful Termination in Violation of Public Policy

Hallak argues the "[t]rial court erred by dismissing [her] wrongful termination in violation of FEHA claim." We conclude this argument is forfeited.

A.

Trial Court's Decision on the Motion for Summary Judgment

In dismissing Hallak's third cause of action, the trial court reasoned "that Labor Code § 1025 cannot support a valid claim for wrongful termination in violation of public policy in light of the express holding of *Sullivan v. Delta Air Lines* (1997) 58 Cal.App.4th 938, where the First District Court of Appeal explained that the policy expressed by Labor Code § 1025 is not 'substantial and fundamental' and may not support a common law claim for tortious discharge in violation of public policy."

The trial court further found: "While the complaint here does vaguely allege that [Kaiser] violated unspecified provisions of the FEHA, the only FEHA provisions which [Hallak] argues [Kaiser] actually violated relate to disability discrimination and an employer's duty to reasonably accommodate an employee's disability. However, this argument is of no legal consequence here because [Hallak] has failed to produce any admissible evidence which is sufficient to establish that she suffered from any disability within the meaning of the FEHA and in fact the opposition papers in response to [the statement of undisputed facts] that as of 9/15/2014 [Hallak] had 'no disabilities which

prevented her from returning to work at [Kaiser]. This admission, in and of itself, defeats any suggestion that [Hallak] was the victim of disability discrimination. Moreover, in the absence of any genuine or claimed disability, [Kaiser] had no duty under the FEHA to provide [Hallak] with some sort of reasonable job accommodation. Instead, [Hallak] seems to argue that [Kaiser] had an obligation to accommodate the conditions stated in her agreement with Maximus but [Hallak] has provided no legal authority for such a broad proposition. [¶] Even if [Hallak] had produced evidence that she suffered from some disability at the time she sought to return to work with [Kaiser] in September 2014, there is still no admissible evidence which tends to show that [Kaiser's] decision to terminate [her] was in any way motivated by her disability.”

B.

Analysis

On appeal, Hallak does not argue her cause of action for wrongful termination in violation of public policy was supported by a violation of section 1025. Instead, Hallak argues only that her “FEHA claim” supported the cause of action for wrongful termination. The flaw in her argument is that her operative complaint did not articulate a cause of action under FEHA.

Although her complaint mentioned FEHA, she did not assert a claim under that act. Instead, the only mention of FEHA was in asserting the public policy discouraging workplace discrimination “is embodied in various laws and regulations, including FEHA, FMLA, and California Labor Code.” Hallak’s operative complaint does not describe what sort of disability she might have had or in what type of discrimination or harassment Kaiser might have engaged. Hallak’s brief on appeal is equally silent as to what disability she had or how Kaiser violated FEHA. Hallak also does not mention the trial court’s finding she did not allege any facts that Kaiser’s termination of her employment

was motivated by discriminatory intent. For lack of reasoned argument in support of her claim, we deem Hallak's claim forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785.)

III

How the Trial Court Viewed the Evidence

Hallak argues the “[t]rial court erred by not construing evidence liberally in [her] favor” Specifically, she asserts that, “[a]t the very least, there is a triable issue of fact of whether [Kaiser could have accommodate[d her] by placing her into one of those positions” as a pharmacist without supervisory duties “at this large company.” Underlying this assertion is Hallak's assumption that Kaiser had a legal duty under section 1025 to create a new and different position for her. After being terminated by Costco for stealing prescription painkillers on three occasions, Hallak went to Maximus, an agency that handles medical professionals with substance abuse. Maximus required that Hallak attend a drug rehabilitation program and stop working as a pharmacist. Her past narcotics thefts led to her agreement that she no longer work in an unsupervised capacity. Under the agreement with Maximus, she could no longer work as pharmacist-in-charge, she had to be supervised by someone on site who was at least one management step above her, and she could not work solo night shifts. Kaiser had no supervisory level above her position. And Hallak could no longer work alone during night shifts. This requirement would have changed solo night work into a two-person staffed shift. However, Hallak cites no authority for the proposition that section 1025 requires such an accommodation. Yet, “it is appellant's burden to affirmatively show error” based on citations to legal authority. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.) Hallak has not met her burden.

IV

Evidence of Discrimination

Hallak argues that the “[t]rial court erred by not considering direct evidence of discrimination.” Specifically, Hallak points to a Kaiser human resources consultant’s “e-mail to [Hallak’s] supervisor stating that [Hallak] should be locked out of all [computer] systems, that security should be alerted until [Hallak’s] termination, and that [Hallak] should not be kept on” in her job. We disagree for two reasons.

First, the fact a consultant had a particular opinion does not establish that Kaiser agreed with that opinion or based its action on the consultant’s opinion. In other words, the consultant’s opinion does not establish causation for any discriminatory termination. On this point, we note the trial court expressly found, “there is still no admissible evidence which tends to show that [Kaiser’s] decision to terminate [Hallak] was in any way motivated by her disability,” even assuming she had a cognizable disability.

Second, the consultant’s e-mail itself does not establish discriminatory motive. Hallak sought to participate in a drug rehabilitation program as a consequence of being caught for multiple thefts of narcotics during her work as a pharmacist. The consultant’s recommendation that Hallak be prevented from having the opportunity to steal narcotics from Kaiser comports with laws regulating narcotics. (See generally 21 C.F.R. §§ 1300.01, 1301.71, subd. (a), 1301.75 [imposing duties on hospitals and pharmacies to protect narcotics from theft and abuse].) The consultant’s opinion is consistent with Kaiser’s duty to safeguard its inventory of regulated narcotic drugs from the threat of theft.

DISPOSITION

The judgment of dismissal is affirmed. Kaiser Foundation Hospitals shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

_____/s/
HOCH, J.

We concur:

_____/s/
HULL, Acting P. J.

_____/s/
ROBIE, J.